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BY THE SENATE,

JANUARY, 9, 1872.

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By order,

AUGUSTUS GASSAWAY,

Secretary.

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# R E P O R T

OF

# THE COUNSEL

APPOINTED BY

HIS EXCELLENCY, ODEN BOWIE,

TO ASSIST

The Attorney General in Enforcing the Just Demands of  
the State against the

# BALTO. & OHIO R. R. CO.

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ANNAPOLIS :

WM. THOMPSON OF R., PRINTER.

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1872.





# REPORT.

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*His Excellency, Gov. Bowie :*

SIR—The undersigned, employed as counsel by your Excellency, in accordance with Resolution No. 7, of the Session of 1870, to assist the Attorney General in enforcing “the just demands of the State against the Baltimore and Ohio Railroad Company,” beg leave, respectfully, to report :

That, in conjunction with the late Attorney General, the Hon. Isaac D. Jones, they instituted proceedings at the May Term, 1870, of the Superior Court of Baltimore City, to recover from the Baltimore and Ohio Railroad Company the amount due and in arrears to the State, for one-fifth of the gross receipts from passengers, upon the Washington Branch of the Road, down to the 1st of January, 1870. The payment of the State's share of those receipts has been withheld since July, 1868, as your Excellency is aware, upon the assumption that the Legislative enactments, under which it is payable, and has for so many years been paid, create a “Capitation Tax,” and are in violation of the Constitution of the United States. The form of action chosen was adopted on the theory, that the Company, having collected and received the money in dispute, for the benefit of the State, under the Statutes complained of, without questioning their validity, had no right, in equity and conscience, to question it, when simply called on to account for its collections.

It was assumed, therefore, that the Company was equally bound to the State for the amount of such collections, whether the laws in dispute were constitutional or the contrary. The case coming on for trial in December 1870, a verdict was rendered for the Company, under the instructions of Judge

Dobbin, who held that the laws referred to were unconstitutional, and that the defendant was not liable to the State for the money withheld. An appeal was taken from this decision, to the April Term, 1871, of the Court of Appeals, and after agreement before a full bench, the judgment of the Court below was unanimously reversed by that high tribunal.

While, however, the Court of Appeals agreed in declaring the laws impeached to be entirely free from objection, on the score of unconstitutionality, they did not place their judgment on that ground, but confirmed the theory upon which the action had been brought, and determined that after the Company had collected the moneys in suit, for the State, it could not refuse to pay them over, on the ground that the collection had been unconstitutional. The cause having been remanded to the Superior Court, with the instructions of the appellate tribunal, a second trial was had, and verdict and judgment were accordingly rendered in conformity therewith for the State, on the first of the present month, for \$351,291.18 down to January 1, 1870. The Company has again appealed, with a view to carry the constitutional question, if practicable, to the Supreme Court of the United States.

The Court of Appeals will of course affirm the present judgment of the Superior Court, which has been rendered in obedience to its mandate.

This cannot be done in the ordinary course, until the April Term of 1872, and a writ of error, if allowed, will carry the case to the December Term, 1872, of the Supreme Court.

It is the opinion of the State's counsel, that the Supreme Court has no jurisdiction in the case, its right to review the judgment of the State Courts being confined to cases in which it appears "that the Court below could not have reached the conclusion and judgment it did reach" without applying the constitutional provision in controversy to the case in hand. (*Furman vs. Nichol*, 8 Wallace, 56.) It must, on the face of the record, appear that the constitutional question "was necessarily involved in the decision, and that the State Court would not have given a judgment without deciding it," (*Par-melee vs. Lawrence*, 11 Wallace, 38.) As the precise contrary of this appears, affirmatively, in the present case, it is not



believed that the jurisdiction of the Supreme Court can attach in the premises, and the controversy upon the point is therefore regarded as practically at an end.

Three suits, similar to the one described, have been instituted, subsequently thereto, for the recovery of the semi-annual amounts due on the 1st of July, 1870, the 1st of January and 1st of July, 1871. A fifth, for the recovery of the amount due on the 1st of January, 1872, will have been instituted before the meeting of the Legislature. These proceedings will, of course, await the final determination of the principal case. It is proper to add, that the pretension of the Company to plead a set-off against the claim of the State was rejected, by both the inferior and the Appellate Court. Upon this point there is no question of further appeal; and it is, therefore, now conclusively settled, that the Company cannot meet the claims of the State by claims of its own, but must seek such relief, as it may be deemed entitled to, from the justice of the General Assembly.

The second matter to which the attention of the State's counsel was called, in the discharge of their duty, was the demand of the Company against the State, which formed the subject matter of the set-off pleaded in the first action. The alleged indebtedness of the State was said to have arisen from payments of interest, made by the Company for the State, in London, on the five per cent. sterling bonds issued by the State, for the benefit of the Company, under the Act of 1838, ch. 386. These payments were made in gold, and, during the war, while the paper currency of the country was at a heavy discount. It was alleged by the Company that its disbursements of premium, exchange, &c., on account of the State, had brought the latter into its debt \$289,529.65, down to the 1st of July, 1865. It appeared to the counsel of the State, on the other hand, that upon a proper interpretation of the statutes, the Company was bound to pay to the State, in gold, and not in currency, the guaranteed interest or dividends due by the Company to the State upon its preferred stock, under the Act of 1835, ch. 395, and that if this view were sustained by the Courts, the Company would be largely indebted to the State, on this account, instead of being its creditor. Suit was accordingly instituted, upon this theory,

against the Company, to the May Term of the Superior Court, in 1870, and, in December of that year, the legal questions at issue were determined by Judge Dobbin, in favor of the State, upon the grounds taken by counsel. As the case, however, required the minutest investigation of a large mass of accounts, extending over twenty years, and multitudinous in their details, the papers were referred to the Auditor of the Court, J. Morrison Harris, Esq., to state on account or accounts, in conformity with the opinion of the Court, under the instructions of counsel.

It was not until within the present term of the Court that Mr. Harris was able to state the results of his examination, attained only after the most protracted and incessant labor. The cause has not been brought to final hearing, by reason of the absence from the State of the senior counsel of the Company, but it is now ready, and will be called up at an early day. The accounts, as stated, show, upon the theory of the State and the principles already adjudicated by Judge Dobbin, a balance due the State, principal and interest, down to January 1st, 1870, of \$250,187.17, in gold.

It is gratifying to be able to add that the mere rectification of this account, apart from all controverted questions, has resulted in the discovery of conceded errors (scarcely avoidable in transactions so large and covering so much time), by the correction of which the State is a gainer in every event, to the amount of probably \$40,000—certainly enough largely to exceed all possible expenses of the present and any probable future litigation.

In addition to the proceedings thus far enumerated, and covering all the points which were mooted in the able discussions of the General Assembly of 1870, the counsel of the State have felt it their duty to file a bill in equity against the Company in the Circuit Court of Baltimore City. The object of this proceeding is to obtain relief from the operation of a change in the distribution of the expenses and profits of the main stem of the Baltimore and Ohio Railroad and its Washington Branch, which was made in the year 1863, by the President and Directors of the road, and by which great injustice is believed to be done to the rights and interests of the State as a stockholder of the Washington Branch. The



change and apportionment in question are charged to be entirely arbitrary and illegal, and to have been made by the Board in excess of its authority. The bill, therefore, prays the necessary discovery, and that the proper accounts be taken. It contains a prayer for an injunction, likewise, which has not, thus far, been pressed, out of what is deemed but a proper consideration for the interests of the Road and the public.

The answer of the Company denies the allegations of the bill, and claims that the apportionment of expenses and profits complained of was a matter within the discretion of the Board, and in the absence of fraud (which is not alleged) is binding on the stockholders, and cannot be judicially inquired into.

The inquiries started by this last proceeding are very grave, and the interests involved are of great magnitude. Pending the protracted examination of the books of the Company, for the purposes of the common law proceeding, last before mentioned, it has not been practicable to enter upon the still more extensive and complicated questions of account, the solution of which is indispensable to the determination of the equity matter. The controversy cannot be otherwise than extremely protracted and laborious, but its institution has been deemed essential to the proper discharge of the duties imposed on the counsel of the State by the resolution directing their employment.

Respectfully submitted,

I. N. STEELE,  
P. F. THOMAS,  
S. T. WALLIS,

BALTIMORE, December 30th, 1871.







